

NEW YORK CLEARING HOUSE

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August 20, 2002

Financial Crimes Enforcement Network
P.O. Box 39
Vienna, Virginia 22183

Attention: Section 312 Interim Regulations
regcomments@fincen.treas.gov

Re: Interim Final Rule under Section 312 of the USA
PATRIOT Act

Ladies and Gentlemen:

The New York Clearing House Association L.L.C. (the "Clearing House")¹, joined by the Bankers' Association for Finance and Trade², believes that the Department of the Treasury

¹ The members of the Clearing House are: Bank of America, National Association; The Bank of New York; Bank One, National Association; Citibank, N.A.; Deutsche Bank Trust Company Americas; Fleet National Bank; HSBC Bank USA; JP Morgan Chase Bank; LaSalle Bank, National Association; and Wells Fargo Bank, National Association.

² The Bankers' Association for Finance and Trade has, since 1921, been the spokesperson for the international interests of the U.S. commercial banking industry.

and the Financial Crimes Enforcement Network (collectively, the "Department") have adopted a thoughtfully balanced and carefully considered approach in its interim final rule (the "Interim Rule") under section 312 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the "Act"). 67 Fed. Reg. 48,348 (July 23, 2002). As the Department recognized, this approach was required because "[w]ithout question, the proposed rule implementing section 312 is the furthest reaching proposed regulation issued under Title III of the Act thus far." 67 Fed. Reg. at 48,349.

The Clearing House appreciates the Department's recognition that "commenters have raised substantial and important concerns about the scope of the regulation as well as the major definitions... [such as] 'correspondent account,' 'covered financial institution,' and 'foreign financial institution.'" Id. As stated in the joint comment letter on the Department's proposed rule implementing section 312 of the Act (the "Proposed Rule"), dated July 1, 2002 (the "Joint Comment"), all of the commentors, including the Clearing House, are committed to assisting the Department in developing regulations relating to due diligence that best achieve our common objective of deterring and preventing money laundering and terrorist financing.

The Clearing House agrees with the Department's view, as expressed in the Interim Rule, that financial institutions will need "clear and unequivocal direction" in the Final Rule. We appreciate the Department's conclusion that following existing industry guidance, including the Clearing House's "Guidelines for Counter Money Laundering Policies and Procedures in Correspondent Banking" (March 2002) and the Wolfsberg Group's "Global Anti-Money Laundering Guidelines for Private Banking: Wolfsberg AML Principles" (1st Revision May 2002), is a reasonable basis for compliance with section 312.

As was explained in the Joint Comment, we, along with the other commentors, believe that a risk-based approach is essential to an effective and efficient due diligence program. We strongly support the Department's risk-based approach in the Interim Rule, and, we urge the Department to take a similar approach in the final rule implementing section 312 (the "Final Rule"). In particular, we are encouraged by the Department's decision to allow institutions to assign priority to high-risk accounts opened on or after July 23, 2002, and to focus on correspondent accounts that provide deposit services and are used to provide services to third parties.

We do wish to reiterate our comments in the Joint Comment regarding the timing of implementation of the Final Rule. The Clearing House urges the Department to adopt a bifurcated approach to implementation of the Final Rule that distinguishes between new accounts and existing accounts. This approach is consistent with the similar risk-based distinction set forth in the Interim Rule. As noted by the Department, the interim compliance measures set forth in the Interim Rule may not be indicative of the obligations that will be imposed by the Final Rule. Therefore, our member banks will need time after publication of the Final Rule to review and analyze the new obligations and put responsive due diligence and enhanced due diligence procedures in place. As the Department recognized in the Interim Rule, it would not be appropriate for institutions to develop procedures and systems based on the "terms of the proposed rule pending the completion of a final rule." 67 Fed. Reg. at 48,349. This would not only "undermine the administrative process, but also it might require financial institutions to incur substantial costs to comply with provisions of the proposed rule that may be altered or eliminated." Id.

We also wish to reiterate our belief, as stated in the Joint Comment, that a key component to an effective risk-based due diligence program is reliance, in appropriate circumstances, on the due diligence conducted by reputable intermediaries on their own clients. Assuming that a covered financial institution has conducted appropriate due diligence on the intermediary, and has determined that the intermediary has satisfied relevant criteria, we believe it would be unfruitful and unnecessary to attempt to replicate the due diligence process that has already been conducted by the intermediary on its own client base. It is not reasonable to expect that the covered financial institution could perform due diligence superior to that conducted by the intermediary; indeed, in many cases, the covered financial institution would have at most limited ability to conduct due diligence on the intermediary's clients. The Clearing House believes that this view should inform the Department's approach to compliance with section 312 in the interim period prior to promulgation of the Final Rule.

Finally, we would express one specific concern regarding the requirements of the Interim Rule. The preamble to the Interim Rule states that, for purposes of section 5318(i)(2)(B)(i), "an owner is deemed to be any person who directly or indirectly owns, controls, or has voting power over 5 percent or more of any class of securities of a foreign bank, the shares of which are not publicly traded." As we indicated in the Joint Comment, such a definition is so sweeping that it is very difficult to implement, inconsistent with the regulations published under sections 313 and 319, and inconsistent with the basic concept of a risk-based approach. Moreover, we respectfully suggest that this definition goes beyond the statutory language. We are hopeful that the Department would accept a risk-based approach to the definition of "owner" for purposes of section 5318(i)(2)(B)(i), and would not require strict adherence to a 5 percent test during the interim period

prior to implementation of the Final Rule. We also urge the Department to revise the definition in the Final Rule along the lines suggested in the Joint Comment.

The Clearing House appreciates the opportunity to comment on the Interim Rule, and would be pleased to discuss any of the points made in this letter in more detail. Should you have any questions, please contact Norman Nelson, General Counsel of the Clearing House, at (212) 612-9205.

Very truly yours,

A handwritten signature in dark ink, appearing to read "J. Heath", with a horizontal line drawn underneath the name.